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In The Supreme Court of The United States

OCTOBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

v.

Appellants,

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts, dated July 21, 1972, dismissing the complaint is reported at 345 F. Supp. 1140. The memorandum of the United States Court of Appeals for the First Circuit, dated September 10, 1973, reversing the order of the District Court, is not reported. The opinion of the dis-

trict court of three-judges, dated May 31, 1974, is reported at 376 F. Supp. 753. The opinion of the district court of three-judges, dated December 12, 1974, is reported at 386 F. Supp. 179. The opinions below are reproduced as an appendix to the jurisdictional statement.

JURISDICTION

The district court on December 12, 1974 entered its order enjoining the Massachusetts Board of Retirement from enforcing Mass. Gen. Laws ch. 32, § 26 (3) on the grounds of the statute's unconstitutionality. The claim of appeal was filed with the district court on December 23, 1974. (A.J.S. 24-26). Appellants filed their jurisdictional statement on February 21, 1975. Probable jurisdiction was noted on May 19, 1975. 95 S.Ct. 1973 (1975). The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

STATUTORY PROVISION INVOLVED

The validity of Mass. Gen. Laws ch. 32, § 26(3) is involved. Said statute provides, in pertinent part:

> Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

The text of the pertinent portion of the statute is found at page 210 of Volume 3A of the Massachusetts General Laws (West Publishing Company, 1966).

QUESTION PRESENTED

Whether Mass. Gen. Laws ch. 32, § 26(3) mandating the retirement of uniformed State Police officers at the age of 50 is constitutional?

STATEMENT OF THE CASE

Prior Proceedings:

On May 8, 1972, the Massachusetts Board of Retirement notified the plaintiff, Robert D. Murgia, that he would be retired on July 23, 1972, the day on which he would reach age 50. Murgia thereupon commenced a civil action in the United States District Court for the District of Massachusetts to enjoin the operation of the mandatory retirement statute, Mass. Gen. Laws ch. 32, § 26(3)(a). The complaint alleged that mandatory retirement at age 50 denied him equal protection of the laws, and he requested the convening of a three-judge court to adjudicate that claim. (A. 12-16). On July 18, 1972, a district court judge held a hearing to consider whether a three-judge court should be convened and whether a temporary restraining order should be issued.

The district judge denied the relief requested and dismissed the complaint for failure to raise a substantial federal question. 345 F. Supp. at 1144. (A.J.S. 9). The court ruled that the challenged statute was a valid exercise of state legislative power.

> Early retirement even of high-ranking officers gives younger men a chance for promotion and ensures that commanders possess the physical vigor to accompany their men in the field. These are surely legitimate purposes. Mandatory retirement at the age of 50 is at least a rational, if not the only, means of achieving them. 345 F. Supp. at 1142-1143. (A.J.S. 6).

Murgia appealed to the United States Court of Appeals for the First Circuit which reversed the order of the district court and remanded for the impanelling of a three-judge

court. In a one-paragraph memorandum, the Court of Appeals stated that being "mindful of the strictures of *Goosby* v. *Osser*, 409 U.S. 512 (1972) and of the ambiguities in *Frontiero* v. *Richardson* [411] U.S. [677] (May 14, 1973)" it was "unable to say that the claims presented afford 'no room' for controversy." (A.J.S. 10).

After remand, the Board of Retirement filed a motion to dismiss, essentially contesting the sufficiency of the complaint. (A. 17-18). The district court then set the matter down for hearing, ordering the parties to file a statement of agreed facts. (A. 6). Before the hearing, Murgia amended his complaint to challenge the retirement statute on due process as well as equal protection grounds. The retirement statute was claimed to have no rational relationship to any state interest and to create an irrebuttable presumption of unfitness to perform the duties of the State Police. (A. 22-23). Thereafter, the district court heard the motion to dismiss and denied it without prejudice. (A. 7). As the parties did not agree to the facts they filed a record consisting of depositions, affidavits and other documentary material. The district court allowed time for the filing of briefs and took the matter under advisement. (A. 7-8).

On May 31, 1974, the district court filed an opinion which declared that Mass. Gen. Laws ch. 32, § 26(3) was unconstitutional. The court ruled that "a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest." 376 F. Supp. at 754 (A.J.S. 12). The court "acknowledged that service in this branch is, or can be, arduous, and that high versatility is required, with few, if any, backwaters available for the partially superannuated." *Id.* (footnote omitted). The court also noted that "[e]ven plaintiff's experts concede that there is a general relationship between advancing age and decreasing physical ability

to respond to the demands of the job." 376 F. Supp. at 755. (A.J.S. 14). The court nevertheless concluded that the plaintiff had established the absence of any factual basis for mandatory retirement at age 50. 376 F. Supp. at 756. (A.J.S. 17).

The review of the factual record by the district court focused primarily on the availability of individual physical examinations. Every State Police officer is given a comprehensive medical examination every two years until age 40, and annually thereafter. Because individual testing was "not impracticable" and because "the relation between chronological age and functional age varies greatly from one individual to the next," the district court concluded that the standard set by the legislature was not reasonable. 376 F. Supp. at 755. (A.J.S. 14-15). The court stated that it must "look . . . in another direction for reasonableness—is there, for example, a greater risk at the higher age that the test, or, more exactly, the prognosis based upon testing, will be less reliable?" *Id.* (A.J.S. 15). The court then noted that no study had been made to demonstrate that a critical area is reached at age 50, and it made the judgment that no such determination could be made in this case. 376 F. Supp. at 755-56. (A.J.S. 16). The court held "that plaintiff has at least a recognizable interest in retaining his employment which the state can not deny arbitrarily and irrationally, . . . and [found] . . . that mandatory retirement of officers at 50 years of age bears no 'fair and substantial relation to the object of the legislation.' " 376 F.Supp. at 754 (A.J.S. 13) (footnote and citations omitted).

After a further hearing on the relief to be granted, the district court enjoined the operation of Mass. Gen. Laws ch. 32, § 26(3) and ordered the reinstatement of Murgia as Lieutenant Colonel in the State Police. The order was

stayed pending appeal. (A.J.S. 24). Murgia has received and continues to receive retirement benefits under the challenged statute. (A.J.S. 21).

Facts:

The uniformed branch of the Massachusetts State Police is organized in a para-military structure (R. Doc. No. 4, Rules and Regulations of the uniformed branch), and consists of approximately 850 officers. (A. 32, 48). Its primary law enforcement responsibility is the protection of life and property in the Commonwealth of Massachusetts. This requires, on the part of each uniformed officer, a physical and psychological capability to react with the strength and decisiveness such duties continually demand. For example, uniformed officers participate in "restoring and maintaining order in prison and civil disorders, responding to emergencies and natural disasters, patrolling highways in marked cruisers, investigating crimes and apprehending criminals." (A. 54-55). The uniformed branch also serves as the primary back-up force for the maintenance of law and order in the municipalities of the Commonwealth. In order to maximize the availability of uniformed officers for the performance of these duties, administrative functions such as radio dispatch work are assigned to civilians. (A. 57-58).

The extraordinary demands on uniformed officers are intensified by the fact that traditionally less strenuous work is assigned to an entirely distinct group, the detective branch of the State Police. The detectives perform the duties of "the investigation of crimes, the detection and the arrest of criminals, the collection of evidence, and the assistance of the preparation of cases in court." (A. 55). Occasionally members of the uniformed branch may perform

these functions as an incidental part of their front-line responsibilities, but in no event do detectives perform the functions of the uniformed officers. (A. 55).

The general operations of the uniformed branch are distinct from those of municipal police departments. As explained by the Commissioner of Public Safety:

> The uniformed branch is a relatively small force designed to cover the entire state. As a result, a state police cruiser is generally manned by only one officer, must cover a wide geographical area and may be as much as 30 minutes away from back-up assistance in case of an emergency. On the other hand, a municipal cruiser is generally manned by two officers, must cover a limited geographical area and is generally only a few minutes away from back-up assistance. (A. 57).

The enlistment age for uniformed officers is between 19 and 29. Mass. Gen. Laws ch. 22, § 9A. Applicants must pass a physical and a written examination and an agility test. (A. 126). Upon appointment a uniformed officer must pass the physical examination biennially until reaching the age of 40, and annually thereafter. (A. 146). There is no further agility test during an officer's career. The uniformed officer must retire "upon his attaining age fifty or upon expiration of . . . twenty years [of service], whichever last occurs." Mass. Gen. Laws ch. 32, § 26(3)(a). A uniformed officer may voluntarily retire before attaining age 50 if he has served for 20 years. Mass. Gen. Laws ch. 32, § 28A. Upon retirement, an officer receives a retirement allowance

> equal to one-half of the average annual rate of his regular compensation during the twelve-month period of his creditable service immediately preceding the date his retirement allowance becomes effective; provided, that the total amount of the allowance shall be increased

by one twelfth of one per cent for each full month of service in excess of twenty years' service and prior to the last day of the month in which such member will attain the age of retirement. Mass. Gen. Laws ch. 32, § 26(3)(c).

In contrast to the age 50 mandatory retirement law for uniformed officers, detectives in the Division of State Police are mandatorily retired at the age of 65. Mass. Gen. Laws ch. 32, §§ 1, "Maximum Age", 3(2)(g), "Group 4." The mandatory retirement age for municipal police officers is generally set at 65 or 70, depending on the municipality. Mass. Gen. Laws ch. 32, §§ 1, "Maximum Age", 3(2)(g), "Group 4."

There are also special statutory provisions for the disability retirement of uniformed officers. Retirement under ordinary disability is governed by Mass. Gen. Laws ch. 32, § 6. If a uniformed officer has completed fifteen years of service and has become "totally and permanently incapacitated for further duty," he may apply for an ordinary disability retirement allowance. Various options for payment are specified in Mass. Gen. Laws ch. 32, §12. However, "[r]etirement for [p]hysical or [m]ental [i]ncapacity [c]aused by [i]llness or [i]njury [i]ncurred in [p]erformance of [d]uty" is governed by Mass. Gen. Laws ch. 32, § 26(2). In addition, by virtue of Mass. Gen. Laws ch. 32, § 94, "any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a uniformed member . . . of the state police in the department of public safety . . . [shall] be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence."[1] The retirement

[1] This section also applies to members of certain fire departments and other police forces, and to certain employees of the Registry of Motor Vehicles, the Department of Correction and Logan International Airport.

allowance is 72 per cent of the average annual rate of compensation received during the last year of service. Mass. Gen. Laws ch. 32, § 26(2)(b)(i). The ordinary and accidental retirement provisions may also result in involuntary retirement according to certain statutory procedures set forth in Mass. Gen. Laws ch. 32, § 16.

In the proceedings below, three physicians testified concerning the general relationship between aging and the ability to perform physically stressful functions. Dr. Paul Murphy, the State Police Surgeon, testified as to his familiarity with the physical and psychological factors involved in performing State Police functions. (A. 142-145). According to his testimony, the impact of these factors on the physical condition of a uniformed officer coupled with the general decrease in the elasticity of the cardiovascular system occurring after the age of 40 results in an increased incidence of cardiovascular disease among the State Police. He testified that twice the number of uniformed officers between the ages of 40 and 50 as would be expected in the general population suffered from hypertension, a form of cardiovascular disease. His conclusions were that the average uniformed officer is not physically capable of performing the full duties of such an officer at the age of 50 and that uniformed officers should mandatorily retire upon serving 20 years or reaching the age of 50, whichever is earlier. (A. 172-173, 185). These conclusions apply to a high ranking uniformed officer because of the additional stress caused by command responsibilities in field operations. (A. 186-187). He also stated that a physician without particularized knowledge of the stress in State Police work and its impact on the physical condition of individual officers would be unable to form a reliable medical opinion concerning the rationality of mandating retirement at age 50. (A. 177-178).

On the basis of the considerable experience with the de-

velopment and enforcement of medical fitness standards with the National Guard, Dr. Murphy also made comparisons between the National Guard and State Police retirement systems. He considered the position of battalion commander to be analogous to that of the uniformed officer because of the required service in combat-like situations. The recommended retirement age for battalion commander is 45. (A. 180-182).

Dr. Thomas Dawber, a former career officer in the United States Public Health Service and presently an associate professor of medicine at Boston University, testified generally on the relationship between aging and ability to perform stressful functions. He acknowledged that the older the individual is, the greater the risk of incurring a malfunction of the cardiovascular system. In particular, he concurred that this relationship would hold true in cases of severe physical stress. (A. 73-74). In order to assess what the risk for any particular individual might be, "a detailed number of studies" would have to be conducted. The risk would nevertheless increase with age. (A. 77-78). He did not consider mental stress factors relevant to the question of cardiovascular disease, but recognized that other experts would disagree. (A. 90). His only knowledge of the State Police was based on a reading of various rules and regulations. (A. 89). From these, he asserted that one could not conclude that the average State Police officer is unable to perform his duties at the age of 50. This judgment was based in large part on the fact that at age 50 administrators have accumulated a considerable degree of organizational skill. (A. 84-86).

Dr. Thomas F. Silva, Jr., a surgeon, also testified. Based on a review of the rules and regulations, he concluded that mandatory retirement at age 50 was premature, in that a

man of 50 could perform the functions of a State Police officer. (R. Deposition of Dr. Thomas F. Silva, Jr., pp. 10, 11). He had performed no systematic study of the physical requirements of the State Police and conceded that the opinion of a medical expert with experience relating to the State Police would be entitled to more weight than that of one without such experience. (R. Deposition of Dr. Thomas F. Silva, Jr., pp. 20, 30).

The affidavit of Dr. Thomas Lee Kurt was also filed by the plaintiff. His opinions related generally to the variations between functional age and chronological age. He did not specify the means whereby functional age would be determined, nor was he able to relate his general comments to the particular content of the State Police functions. (R. Affidavit of Dr. Thomas Lee Kurt, pp. 3-9).

The three physicians, Murphy, Dawber and Silva, described the medical condition of the plaintiff Murgia as indicated by separate physical examinations. Dr. Murphy stated that Murgia was in good physical condition except that he had symptoms of presbyopia, a condition generally associated with aging and indicated by a loss of near vision and a mildly elevated systolic blood pressure. (A. 172). Dr. Dawber, based on an examination conducted entirely in his university office, stated that he was in generally good health except that his blood pressure was slightly elevated. (A. 66, 69). Dr. Silva also concluded that Murgia was "a healthy male of 51," (A. 112).

SUMMARY OF ARGUMENT

Massachusetts legislative history and this Court's interpretation of the Equal Protection Clause both establish that the statute mandating retirement at age 50 for uniformed State Police officers, Mass. Gen. Laws ch. 32, § 26(3)(a), is a legitimate, constitutional exercise of legislative power.

Appellants' first argument places the retirement statute within its full historical and statutory context. Massachusetts was an early leader in the development of such legislation for public employees. In 1911, it enacted the first general public employee retirement and pension system in the country. Since that time the Legislature has continually reassessed and modified its scheme, refining both retirement ages and pension benefits. Throughout its long experience, Massachusetts, like all other states and the federal government, has pursued two objectives: maintenance of an effective public labor force and provision of financial security for those who have served the state as public employees.

As part of its effort to better achieve these goals, Massachusetts has, over the years, set different ages of retirement according to the relative physical and psychological demands of the job. Like almost every other jurisdiction, it has singled out police forces and other agencies performing physically strenuous and hazardous tasks for early retirement. In this regard, Massachusetts has determined that uniformed State Police officers hold the most demanding positions in state government and, accordingly, it has set the lowest mandatory retirement age for these uniformed officers.

The second argument highlights the complex policy issues underlying any decision to modify retirement laws. The

ultimate judgment requires a deep understanding of the state's manpower needs and economic resources; inevitably, it will reflect the decision-maker's own social and economic philosophy. Such a question is singularly inappropriate for judicial resolution. Rather the issue needs to be tested through the dialogue and interplay of the legislative process.

Appellants' third argument turns to the district court's seeming application of the doctrine disfavoring conclusive or irrebuttable presumptions to this case. The irrebuttable presumption doctrine has no place in assessing the rationality of mandatory retirement laws. The district court would extend its use far beyond the paramaters outlined by the Supreme Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), and preceding cases. The natural extension of the district court's approach would result in subjecting exercises of legislative line-drawing to judicial revision whenever individualized determinations of the underlying issue were feasible. This approach would have dire implications for the legislative process and should be rejected.

Finally, appellants' fourth argument considers the only question of constitutional doctrine involved in this case, whether the mandatory retirement statute "rationally furthers some legitimate, articulated state purpose," and therefore meets the requirements of the Equal Potection Clause. Appellants submit that the gravamen of Murgia's challenge to the statute involves a disagreement about the wisdom of a legislative judgment. An examination of the legislative history of the Massachusetts retirement statutes discloses the legitimacy of the state's objectives, and the rationality of adopting a system of mandatory retirement linked with a guaranteed pension as the means of accomplishing these goals.

ARGUMENT

I. THE MASSACHUSETTS RETIREMENT LAW FOR UNIFORMED STATE POLICE OFFICERS IS ONE ELEMENT OF A COMPREHENSIVE RETIREMENT SYSTEM THAT REFLECTS SENSITIVE TREATMENT OF LEGITIMATE LEGISLATIVE CONCERNS.

A. *An Overview of the Massachusetts Statutory Scheme*

Appellants submit that the decision to set age 50 as the mandatory time for retirement of uniformed State Police officers cannot fairly be judged as an isolated legislative determination. It is one part of a long history of concern with both the effective operation of state government and the needs of those who have served the state for a substantial part of their lives. Placed in proper perspective, this legislative history discloses a process of rational deliberation and a sensitive accommodation of diverse policy issues that have earned judicial deference.

While both state and federal legislatures have long since committed themselves to the creation of public employee retirement and pension systems, Massachusetts, from the outset, has been a leader in these efforts. Its first statute, enacted in 1878, established a civilian retirement and pension plan providing for non-contributory disability pensions for policemen in the City of Boston serving fifteen years or more. Act of May 14, 1878, ch. 244, §5 [1878] Mass. Acts & Resolves 201. Between 1878 and 1909, further legislation was passed providing for pensioned age and service retirements of various other groups of public employees.[2]

[2] Firemen, other policemen, teachers, judges of probate and insolvency and prison officers were the employees covered by these early retirement and pension laws. *See, e.g.*, Act of April 18, 1900, ch. 246, § 1 [1900] Mass. Acts & Resolves 177 (authorizing cities to pension any member of a fire department who had reached 65 and had served 20 years, or who had served 20 years and was disabled); Act of June 15, 1892, ch. 378, § 1 [1892] Mass. Acts & Resolves 421 (authorizing cities of not less than 75,000 inhabitants to retire and pension any member of a police department who had reached 65 and had served fifteen years, or who had been permanently disabled in discharge of duty); Act of May 27, 1909, ch. 453, § 1 [1909] Mass. Acts & Resolves 454 (requiring the Metropolitan Park Commission to pension any of its police officers who were permanently disabled and requested retirement, and any officer serving 20 years if judged incapacitated for further service). *See also* Act of May 5, 1908, ch. 498, § 2 [1908] Mass. Acts & Resolves 451 (teachers); Act of June 12, 1906, ch. 474, §§ 1, 2 [1906] Mass. Acts & Resolves 647-48 (judges of probate and insolvency); Act of June 8, 1908, ch. 601, § 1 [1908] Mass. Acts & Resolves 640 (prison officers). For a discussion of all the pre-1910 Massachusetts retirement laws see Mass. H. Doc. No. 1400, at 130-132, 276-279 (1910).

Finally, in 1911, the Massachusetts Legislature established for the first time in the United States a general contributory retirement plan for all persons employed by the state. Act of June 7, 1911, ch. 532 [1911] Mass. Acts & Resolves 546. It is this statute that marks the beginning of governmental acceptance of responsibility for addressing the complex problems associated with aging public employees.

This first general retirement statute was, in retrospect, a very rough response, treating all public employees alike regardless of the nature of the job. The Act provided for voluntary retirement of all public employees at age 60 and mandatory retirement at age 70.[3] Upon retirement each employee received (1) an annuity derived from his compulsory past contributions of not more than 5 per cent of

[3] The Legislature also enacted in 1911 the first disability and retirement pension law specifically for the benefit of the State Police, as a supplement to the general scheme for public employees. Act of July 14, 1911, ch. 675 [1911] Mass. Acts & Resolves 800. This act provided in relevant part that "[a]ny member of the . . . [State Police] department who has performed faithful service for the commonwealth for not less than 20 years, and is, in the judgment of the governor, incapacitated for further service as a member of the said department, shall, if he so requests, be retired, and shall annually receive a pension equal to one half of the compensation received by him at the time of his retirement." The history of the Massachusetts retirement and pension laws for State Police is detailed in Part IB of this brief, pp. 22-26 *infra*.

salary and (2) a pension derived from payments by the Commonwealth equal to the employees' compulsory contribution. Act of June 7, 1911, ch. 532, §§ 5, 6 [1911] Mass. Acts & Resolves 550-553. *See generally* Mass. H. Doc. No. 1400, at 319-321 (1910).

In 1920, nine years after establishment of the Massachusetts retirement system, the United States Congress enacted the first general federal retirement law.[4] In the years since 1911 every state and many local governments have enacted similar measures, so that by 1972 it was estimated that 84 per cent of all state and local public employees—9.1 million individuals—were covered under government retirement plans.[5]

From the outset, retirement and pension legislation have sought to accomplish two objectives: the maintenance of an effective governmental service, and the provision of material support for the individual retiring worker. Every legislative document in Massachusetts takes these objectives as the basic premises of such laws. For example, the Legislative Commission which drafted the 1911 statute stated in its underlying report as follows:

> The problem of providing pensions for municipal employees has been urged upon the attention of the commission by representatives of the city government of Boston and of other cities, and by representatives

[4] Civil Service Retirement Act, Pub. L. No. 66-215, 41 Stat. 617 (1920). The Act provided for the mandatory retirement on an annuity of all employees in the federal classified civil service who had reached age 70 and had served fifteen years.

[5] Bureau of the Census, Social and Economic Statistics Administration, U.S. Dept. of Commerce, Census of Government 1972, 6 Topical Studies No. 1, *Employee Retirement Systems of State and Local Governments*, 1 (1973). For tables describing state and local retirement systems, by state, *see id.*, at 11-23.

> of the organized employees as well. The present practice of keeping on the municipal payroll superannuated workers who have lost their effectiveness means waste of the tax payers' money and demoralization of the working force. Considerations of economy and efficiency, not to mention other motives, demand the establishment of municipal pension systems. . . . We therefore recommend the passage of a bill to authorize the cities and the towns of this Commonwealth to establish retirement systems for their employees . . . .
>
> The same considerations that make for the expediency of pensioning municipal employees hold also in the case of other public employees,—those in the service of the State and the counties. Accordingly, we recommend further the enactment of bills providing for the establishment of retirement systems for State and county employees . . . . Mass. H. Doc. No. 1400, at 316 (1910).

The Commission then took recognition of the individual needs of the retired worker, proposing the creation of an annuity and pension fund by joint contributions of the governmental employer and the employee:

> It is just and right that the State, county, city or town should contribute something to the funds out of which pensions to superannuated employees are paid. Such contributions should be regarded as in the nature of extra compensation for long, faithful and efficient service; that is, in addition to the payment of current wages, the public employer pays a special extra allowance to workers who remain in the service a certain period of years and reach a certain age. This is the logical justification for contributions to pension funds

by employers of labor, whether private, corporate or public.

....

Regarded from the point of view of [the] fundamental principles embodied in the scheme, it might be described as a system of compulsory old age insurance for public employees, on a contributory and cooperative basis. Mass. H. Doc. No. 1400, at 318 (1910).

Over the years the Legislature has emphasized these same dual objectives in its continuing reassessment and refinement of public retirement laws. For example, the Special Commission to Study and Revise the Laws Relative to Retirement Systems and Pensions stated in its 1953 Report to the Legislature:

The Commission as the result of its study to date is fully in accord with the proposition that individual contributory retirement systems for public employees fulfill a useful and constructive purpose and are essential to the maintenance of a sound and progressive personnel policy in public administration. A contributory retirement system seeks to accomplish two broad purposes, namely,—to create a systematic method for retiring from the active working force superannuated and disabled employees, effectuating, by this process, an improved recruitment policy, the stablization of employment conditions through improved morale, and increased efficiency; and secondly, to give effect in the most economical manner to the social obligation by making provision for the employees against insecurity in old age and during disability and to aid the employees in the accumulation of reserves during their productive period to meet these emergencies. All of these

factors contribute to the value of the plans to the public as an employer. Translated into monetary terms, they partially, if not entirely, offset the appropriations by the governmental units for retirement and pension purposes. In the opinion of the Commission, contributory retirement and pension systems are fully justified by the governmental, social and economic advantages that accrue from their operation. Mass. H. Doc. No. 2190, at 8-9 (1953).

See also Mass. H. Doc. No. 2500, at 7-8 (1955).[6]

There should be no question that the Legislature's efforts to achieve a more effective governmental service consistent with the welfare of the individual public employee is a significant undertaking. Moreover, the means chosen—coupling retirement with pension benefits—carries a force of wisdom that is reflected in the fact that this policy has been adopted by government bodies throughout the country. At the same time, appellants recognize that a mandatory retirement plan involves the inevitable loss of individual public employees who remain willing and able to work beyond the prescribed retirement age. Ultimately, it is this consequence of legislative line-drawing that is under attack

[6] The dual purposes cited in these Massachusetts Reports are generally acknowledged as the objectives for all retirement and pension systems. For example, the legislative history of the federal Civil Service Retirement Act of 1920 reveals that the Congress articulated these same goals. The Senate Committee on Civil Service and Retrenchment stated in a Report on S. 1699 (which became Pub. L. 66-215):

> The main purposes to be accomplished by such legislation are:
>
> (1) Greater efficiency and economy in the Government service; and
>
> (2) A moderate provision for the material welfare of those who, by reason of length of service and their inability to longer render full or efficient service, are obliged to retire. S. Rep. No. 99, 66th Cong., 1st Sess. 2 (1919).

The rationales were re-emphasized in the 1966 Report of the Cabinet Committee on Federal Staff Retirement Systems:

in this case. Appellants submit, however, that resolving this inevitable problem by substituting individual determinations of fitness for an across-the-board approach would carry with it enormous difficulties which defy judicial adjustment. As a Commission on Pensions reported the Massachusetts Legislature in 1914:

> It would undoubtedly be most advantageous to the individual and most beneficial to the public service if each case could be treated entirely on its merit as to the time when the employee should be retired. The execution of such a plan among a large number of employees, however, offers obstacles which are well-nigh insurmountable. Mass. H. Doc. No. 2450, at 16 (1914).[7]

Essentially, state and federal legislatures have chosen to avoid the depressing and demeaning task of determining, on a case-by-case basis, when an individual has reached an elusive point of diminished productivity. The use of a single line avoids the psychological destruction inherent in an individualized judgment process and provides a sense of certainty to one's career in public service.

The concept of involuntary age retirement is that it provides an orderly and humane means of releasing personnel after a substantially full work-life and at an age when it may be presumed their efficiency and productivity are either already impaired, or about to become so because of infirmity. It has been justified in terms of maintaining a workforce of optimum capability, creating opportunity for the less senior members of the staff, obviating the need for the employer to adjudge numerous borderline cases of superannuation, removing the indignity or stigma associated with the preferment of charges, and enabling the prospective retiree to plan ahead with certainty. S. Doc. No. 14, 90th Cong., 1st Sess. 73 (1967).

[7] Similar concerns have been voiced at the federal level, from the time of the initial enactment of the 1920 Civil Service Retirement Act. *See e.g.*, 59 Cong. Rec. 6371 (1920); *Hearings Before the House Comm. on the Civil Service*, 77th Cong., 1st Sess. 43 (1941).

While making the judgment that individualized retirement determinations are unsound, the Massachusetts Legislature has sought to refine its across-the-board approach by varying retirement ages according to job classification. The Massachusetts Retirement and Pension System for Public Employees, as enacted in Mass. Gen. Laws ch. 32, classifies all governmental employees into four groups, depending on the nature of their occupations. Mass. Gen. Laws ch. 32, § 3(2)(g). Group 1 is the general category for public employees, comprising most positions in state and local government. The mandatory retirement age for Group 1 is 70 years; voluntary retirement with full pension benefits is permitted at 65. *Id.* §§ 1, "Maximum Age", 5(2)(a). Group 2 includes a wide variety of specified strenuous occupations, and mandates retirement at age 65, with voluntary, full-pensioned retirement at age 60. *Id.* Group 3, the classification at issue in this case, includes uniformed officers in the Division of State Police and mandates retirement at age 50; voluntary retirement with full pension benefits is permitted after 20 years' service, regardless of age. *Id.* §§ 26(3)(a), 28A. Group 4 includes, for the most part, other police forces and firemen in the state, among them the Detective Branch of the State Police. For this group, mandatory retirement is set at age 65, with voluntary-full-pensioned retirement permitted at age 55. *Id.* §§ 1, "Maxmum Age", 5(2)(a). *See generally* Mass. H. Doc. No. 5900, at 12-18 (1973).

The Legislature's efforts to refine the operative ages for retirement indicates that its primary motivation is to insure fair treatment of public employees. In this same vein, a brief examination of the statute's pension program will indicate that, unlike the frequent situations where statutes are justified primarily as money-saving devices, the Massa-

chusetts Retirement law is a major benefits program involving substantial costs.[8]

For example, in its 1973 Annual Report, the Massachusetts Retirement Law Commission compared retirement benefits paid to individuals in 1971 with those paid in 1963. It reported that for the later year, payments totalled $209,371,204 with 12.1 per cent funded by employee contributions, and the balance by government employers. This total more than tripled that of 1963 ($63,636,750), representing an annual growth rate of 15 per cent. The average retirement benefit for individuals in 1971 was $3,709, compared with $2,144 in 1963. Mass. H. Doc. No. 7642, at 9 (1973).[9]

B. *The Retirement Age for Uniformed State Police Officers*

Massachusetts is one of many jurisdictions, including the federal government, which prescribes a mandatory retirement age of 70 for the great majority of their employees while, at the same time, setting a lower mandatory retirement age for police officers, firemen, and others engaged in

[8] The skyrocketing cost of public employee pension systems to governmental employers is a well-established fact. *See, e.g.*, P. DEARBORN, JR., PENSIONS FOR POLICEMEN AND FIREMEN 5-8 (Labor Management Relations Service, National League of Cities, 1974); S. R. Weisman, *Soaring Costs Put a Pinch on City's Pension System*, N.Y. Times, June 23, 1975, § 1, at 1, col. 1.

[9] It is ironic to note that when the Commissioner of Public Safety, who serves as the head of the Division of State Police, proposed to a special Legislative Commission in 1938 that the mandatory retirement age be set at 45 for the uniformed State Police, the sole reason for the Commission's rejection of his proposal was the expense to the Commonwealth. The Commission felt that the added pension costs of such early retirements would impose too great a burden on the state's finances. Mass. H. Doc. No. 1582, at 8-9 (1938).

hazardous or physically demanding occupations.[10] For example, in 1972 Congress provided for mandatory separation of air traffic controllers at age 56, while permitting the Secretary of Transportation, in his discretion, to exempt a controller whom "he deems to possess exceptional skill and experience" until age 61. 5 U.S.C. § 8335(f)(Supp. III 1973), *amending* 5 U.S.C. § 8335 (1970). Further, a 1974 amendment to the same section requires law enforcement officers, such as agents of the Federal Bureau of Investigation, to retire at age 55 or after 20 years' of service, whichever later occurs, although the head of the agency may exempt the employee from retirement until he reaches 60. 5 U.S.C.A. § 8335(g)(Supp. 1975), *amending* 5 U.S.C.A. § 8335 (1967).

Turning specifically to State Police retirement statutes, a recent survey indicates that of the 23 states with separate State Police departments, 17 have prescribed varying mandatory retirement ages at 60 or lower, while only five have mandated retirement at age 65 or above.[11]

These special classifications systems reflect the need for physical strength, stamina, and alertness from persons performing demanding public safety functions. Legislatures have understandably sought to maintain a high level of public safety by requiring employees in these occupations to retire at a lower age than others performing less danger-

[10] Massachusetts is also similar to other jurisdictions in setting a *voluntary* retirement age lower than 70, permitting employees to obtain full retirement benefits if they exercise their option at the earlier age. Typically, the voluntary retirement age is set at 60. S. Doc. No. 14, 90th Cong., 1st Sess. 176 (1967). In Massachusetts the voluntary retirement age for most public employees is 65. See Mass. Gen. Laws ch. 32, § 5 (2) (a).

[11] DIVISION OF STATE AND PROVINCIAL POLICE, INTERNATIONAL ASS'N OF CHIEFS OF POLICE: COMPARATIVE DATA REPORT, 1974 at 109 (1975). The different retirement ages set forth in the study are: 50, 55, 56, 60, 62, 65 and 70.

ous and physically strenuous work. It is also notable in this regard, that in Massachusetts the Legislature has, within the Division of State Police itself, attempted to make a refined distinction in job skills in setting retirement ages. The age 50 retirement level applies only to the uniformed branch, while the non-uniformed detective branch, which carries out less demanding investigative functions, has a mandatory retirement age of 65. Mass. Gen. Laws c. 32, §§ 1 "Maximum Age", 3(2)(g) "Group 4." Plainly, Massachusetts has attempted to match age of retirement with relative job demands as closely as possible.

The distiction between the demands of firefighting, police work and less arduous types of work was recognized more than 60 years ago in Massachusetts. In 1914, a Commission on Pensions proposed to the Legislature an amendment to the 1911 retirement and pension law to set a mandatory retirement age of 65 "except in case of policemen and firemen for whom this age has been set at sixty. There [was] quite a universal agreement among all who were consulted that policemen and firemen should not be required to do active service beyond the age of sixty." Mass. H. Doc. No. 2450, at 16 (1914). *See id.* at 193. With respect to the uniformed State Police force, a Special Commission Report to the Legislature in 1938 took as a widely accepted premise the necessity for younger men to perform the job:

> The Division of State Police, by virtue of the nature of the work demanded of its members, undoubtedly requires comparatively young men of vigorous physique. The nature of the duties to be performed in all weathers is arduous in the extreme, and all but superior officers habitually perform service either mounted on horseback or on motorcycle. No argument is needed to demonstrate that men above middle life are not

> usually physically able to perform such duties. Mass. H. Doc. No. 1582, at 8 (1938).

Since 1938, the motorcycles and horses referred to above have been replaced as modes of transportation, but the recognition of the extraordinary demands of the job remains. For example, in *McCarthy* v. *Sheriff of Suffolk County,* Mass. Adv. Sh. (1975) 325, 322 N.E.2d 758 (1975), the Massachusetts Supreme Judicial Court stated:

> Examination of the various groups established by the statute discloses a legislative intent to provide for earlier retirement of those government officers concerned with the safety of the public. Thus, the statute provides for the early retirement of State Police officers, and other law enforcement personnel and those employed in positions involving potential danger to the safety of the public are also classified in groups having an earlier retirement age than that of general officials and employees. We find this classification to be clearly rational. . . . The sudden incapacitation of a government employee who is directly responsible for the safety of others presents a far greater danger to the public than that of an employee sitting behind a desk or doing general labor. Mass. Adv. Sh. (1975) at 336-338, 322 N.E.2d at 763-764 (footnotes omitted).[12]

[12] The same rationale is evident in congressional reports on the federal retirement systems. The Senate Report on H.R. 9281, which lowered the retirement age for F.B.I. agents and others and subsequently became Pub. L. 93-350, gave the following justification for its favorable report on the bill:

> The history of retirement legislation dealing with law enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically

Appellants recognize that the various statistics, reports, and judicial decisions cited do not, by themselves dispose of the constitutional question presented by this case; the doctrinal implications of the case under the Fourteenth Amendment are discussed later in this brief. Rather, appellants cite these reports and statistics to demonstrate that the imposition of early retirement ages for certain job classifications is part of a general effort to accommodate the needs of government with the needs of retiring public employees. Moreover, the variations among retirement ages prescribed by the states and the federal government for police employees underscore the fact that there is no uniform agreement about a single "appropriate" age of retirement or the precise criteria for setting a single retirement age. Accordingly, judgment should continue to be made by each state on the basis of its assessment of its own peculiar needs and resources.

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capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are more occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire. S. REP. No. 93-938, 93rd Cong., 2d Sess. 2 (1974).

II. THE GROWING ARGUMENTS FOR A FLEXIBLE RETIREMENT SYSTEM CONTAIN COMPLEX, POLYCENTRIC IMPLICATIONS FOR STATE GOVERNMENT AND PUBLIC EMPLOYEES THAT DEMAND RESOLUTION WITHIN A LEGISLATIVE RATHER THAN A JUDICIAL FORUM.

In recent years knowledgeable advocacy organizations as well as government-appointed commissions and task forces have proposed the institution of flexible retirement systems which would not mandate retirement based soley on chronological age.[13]

These reports base their demands for reassessment of mandatory retirement laws on the extended capacities, longer life-spans and sheer increasing numbers of middle-aged and elder Americans.[14] Appellants recognize the force of these arguments, but urge that the single forum where change can properly be accomplished is the Legislature and not this Court.

The factors involved in any judgment of an across-the-board retirement age or in the system of retirement itself

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[13] 1971 White House Conference on Aging, Section Recommendations on Employment and Retirement 1-2, 4-5 (1971); U.S. Senate, Subcommittee on Aging of the Senate Committee on Labor and Public Welfare & United States Senate Special Committee on Aging, 93d Con., 1st Sess., Post-White House Conference on Aging Reports, 1973, at 72-73, 259-260 (Jt. Comm. Print 1973); Governor's Special Planning Commission on Elderly Affairs and the 1971 White House Conference on Aging, Report of the Task Force on Employment 2-4 (Mass., 1971). *See*, J.H. Schulz, Retirement: Background & Issues (1971 White House Conference on Aging, 1971).

[14] It was recently reported that there are presently more than 22 million persons over 65 in the United States, comprising 10 percent of the population. One-fourth of these elderly persons live below the federally-designated poverty level. In 1900, only 4 per cent of Americans were over 65. Hicks, *The Organized Elderly: A New Political Power*, N.Y. Times, June 23, 1975, § 1, at col. 7. See Schulz, *supra* note 13, at 4.

are diverse and often in serious conflict. They include, for example:

—the impact on the balance of equities that changing the retirement age for one agency would have on other public employees.[15]

—the relationship between the ability of public employees to obtain desirable private employment after retirement and appropriate levels of pension benefits;

—the need for legislative adjustment of pension options depending on the age of retirement, including e.g. improvement of after-death family benefits for higher retirement ages and enhancement of annual payment plans for lower age levels. *See* Mass. Gen. Laws ch. 32, § 12(2)(Supp. 1974).

—the effect that changing the retirement age would have on total pension costs, given the fact that pension payments are traditionally keyed to the individual's salary during the final years of employment. *See* Mass. Gen. Laws ch. 32, §§ 5(2)(a),(c)(Supp. 1974).

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[15] Interestingly, recent legislative reports in Massachusetts indicate that the general desire seems to be for lower retirement ages. Thus, a Special Commission concluded in 1973:

> While there may be justification for special rules for determining eligibility and benefit amounts for certain hazardous occupations, there has been a runaway trend to extend these special rules to ever-growing classes of employees. The result is discrimination, or just as real, the feeling of discrimination by the average public employee who sees no basis for a future claim that his job should be labelled as hazardous. It did not seem practicable to the Commission that these lower normal retirement ages for group 2 and 4 could be rolled back or that the groups be narrowed down to the more limited classes of earlier years. Hence if inequities are perceived, the only changes to be effected would require improving the group 1 rules; that is, by lowering the normal retirement ages either to 60 or 55 (Plans A and B respectively). Mass. Doc. No. 5900, at 38 (1973).

—the status of pension benefits as a morally—if not legally—vested right, with the consequent inability to make short term adjustments in pension costs during severe fiscal conditions.

Assessment of these factors demand a thorough understanding of the state's resources, economic conditions, and human needs. Moreover, the relevant judgments inevitably relate to changing social and economic philosophies. As stated by the Cabinet Committee on Federal Staff Retirement Systems in 1966:

> Underlying and emphasizing many of the differences in objectives and the difficulties in finding suitable solutions [to the problems of employee retirement systems] is a loose set of concepts and national attitudes still very much in transition. Formal retirement itself is a relatively new phenomenon in our society, and we are still quite ambivalent about it. . . .
>
> . . . .
>
> . . . Clearly no one social or economic philosophy can adequately explain all of the changing currents of the retirement movement. The society in which our retirement systems were originally designed was relatively static; today's society is characterized by a dynamism that we have not yet learned to assess adequately, much less cope with, and our retirement systems show the strain of the continuing effort to accommodate to this dynamism. S. Doc. No. 14, 90th Cong. 1st Sess. at 14-15.

Appellants' contention that the Legislature is the forum for considering changes in the Massachusetts retirement system might appear harsh if, as a practical matter, the Legislature had turned a deaf ear to these questions. However, the record discloses that the Massachusetts Legislature

continuously has engaged in precisely the sort of reassessment of retirement ages appellee now seeks from this Court.

Since the Massachusetts Commission of Old Age Pensions, Annuities and Insurance proposed the first general retirement law in 1910, there have been at least eleven special legislative commissions appointed to review and propose changes to the retirement system and to report their recommendations to the Legislature.[16]. Moreover, in 1958, the Legislature authorized the establishment of an independent Retirement Law Commission still active today, whose purposes are to:

> . . . [C]onduct continuing studies of the operation of all provisions of law relative to retirement allowances, pensions or annuities; the administration of pensions by state, county, city and town agencies; and . . . [to] study the potential cost of provisions of existing law and of all proposed changes. Said commission shall report annually to the governor and to the general court its activities and accomplishments, and such recommended legislation as may be necessary to effect desirable changes in the retirement law and to promote a more efficient administration thereof. It may prepare and publish reports for the information of employees concerning benefits available and procedures to be followed, and reports to the public to promote more adequate understanding of the retirement policies and problems of the commonwealth. Mass. Gen. Laws ch. 6, § 103, *as inserted by* Act of Oct. 3, 1958, ch. 623, § 2 [1958] Mass. Acts & Resolves 515.

[16] See Mass. H. Doc. 2450 (1914); Mass. H. Doc. No. 1203 (1921); Mass. S. Doc. No. 5 (1926); Mass. H. Doc. No. 3 (1932); Mass. H. Doc. No. 1582 (1938); Mass. H. Doc. No. 1950 (1945); Mass. H. Doc. No. 2000 (1948); Mass. H. Doc. No. 2190 (1953); Mass. H. Doc. No. 2737 (1953); Mass. H. Doc. No. 2763 (1953); Mass. H. Doc. No. 2500 (1955); Mass. H. Doc. No. 2849 (1957); Mass. H. Doc. No. 5900 (1973).

Pursuant to this statute the Commission has submitted annual reports to the Legislature commenting on proposed amendments to the Commonwealth's retirement laws as well as special reports on particular aspects of the retirement and pension system's operation. *See, e.g.,* Mass. H. Doc. No. 5316 (1967) (special report on the feasibility of changing the retirement ages and increasing the pension benefits for certain police officers and firemen).

The Commonwealth's continued willingness to consider adjustments in its retirement policy is nowhere more forcefully illustrated than in its treatment of the State Police. The Massachusetts State Police force first came into existence in 1865. Act of May 16, 1865, ch. 249 [1865] Mass. Acts & Resolves 631. The first retirement and pension law pertaining to the State Police was enacted in 1911. Act of July 14, 1911, ch. 675 [1911] Mass. Acts & Resolves 800. This law provided in part that a member of the force could request retirement if he had served not less than 20 years, but his request would only be accepted if, in the judgment of the Governor, he was "incapacitated for further service as a member of [the] department. . . ." The substance of this law remained unamended until 1939.[17]

In 1937 the Commissioner of Public Safety proposed legislation for a separate retirement fund covering State Police officers and a mandatory retirement age of 45. Mass. H.

[17] The changes during this period were mechanical and procedural ones, replacing the reference to "district police" appearing in ch. 675, § 1 [1911] Mass. Acts & Resolves with the words "state police," and transferring from the Governor to the Commissioner of Public Safety the power to act on a retirement request of a State Police officer. See Act of May 27, 1921, ch. 487, § 1 [1921] Mass. Acts & Resolves 590.

Doc. No. 513 (1937). The Legislature sent this bill, together with other proposed amendments to the retirement law, to a special commission for its analysis. Ultimately, the commission declined to recommend this bill's enactment, but in 1939 the Legislature did amend the retirement statute to provide for the mandatory retirement of State Police officers at age 50. Act of Aug. 12, 1939, ch. 503, § 3 [1939] Mass. Acts & Resolves 737-738.

Thereafter, in 1955, another special commission recommended to the Legislature that the normal retirement age for non-uniformed members of the State Police be raised from 55 to 60. It also recommended that the retirement age for uniformed members remain at 50, although it observed that there might be "some argument" for raising it above that age. It suggested that the retirement age for these members be reviewed regularly. Mass. H. Doc. No. 2500, at 22, 24 (1955). Similarly, a subsequent special commission reported to the Legislature in 1973 that among the "fundamental issues" it debated were questions relating to "Normal Retirement Age" and the overall concept of compulsory retirement. Mass. H. Doc. No. 5900, at 24 (1973). Thus it seems clear that the Massachusetts Legislature, not only as a matter of institutional competence but because of its actual commitment, is the appropriate forum in which to press for change.

III. THE IRREBUTTABLE PRESUMPTION DOCTRINE HAS NO PLACE IN ASSESSING THE CONSTITUTIONAL VALIDITY OF THE MASSACHUSETTS MANDATORY RETIREMENT AGE FOR UNIFORMED STATE POLICE.

A challenge under the Fourteenth Amendment to a state statute mandating retirement at a specific age—like every challenge to a statutory classification—involves two distinct levels of inquiry. At one level, the question is whether the retirement line drawn by the Legislature rationally serves a legitimate government objective. This is a substantive question traditionally considered within the framework of the Equal Protection Clause. *See, e.g., San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 40 (1973); *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). The second, separate level of inquiry is whether a particular individual falls above or below the retirement line. The essential concern here is whether the procedure used to classify the individual with respect to that line comports with the requirements of due process. *See, e.g., Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

In holding Mass. Gen. Laws ch. 32, § 26(3) unconstitutional, the district court appears to have intermingled these two separate lines of inquiry. At one point, the court did find that the mandatory retirement provision of the statute bore no "'fair and substantial relation to the object of the legislation,'" citing *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920) and *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). 376 F. Supp. at 754. This determination would seem to involve an inquiry into the substantive nature of the Legislature's classification scheme—a traditional examination of the constitutionality of its particular means-end justification. At bottom, however, the thrust of

the district court's holding was its belief that individual determinations of a particular officer's fitness were practicable and therefore made unnecessary the Legislature's resort to a single mandatory retirement line. This focus reflects a concern not for substance but for the process by which an individual officer is brought to retirement. It suggests that the district court utilized a second-level procedural analysis as its principal basis for answering in the negative the first-level inquiry into the statute's substantive rationality. In so doing, the district court misconstrued recent opinions of this Court interpreting the Fourteenth Amendment.

In these cases the Court has employed a procedural doctrine which disfavors "conclusive" or "irrebuttable" presumptions in a number of factual contexts which seem at first blush to raise only substantive questions of equal protection. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973). *Vlandis* v. *Kline*, 412 U.S. 441 (1973). *See Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971).[18] *See also Carrington* v. *Rash*, 380 U.S. 89 (1965).

The district court in comparing the Massachusetts State Police retirement statute to the pregnancy leave regulations at issue in *LaFleur*, *supra*, 376 F. Supp. at 756, appears to have considered the case at bar as falling within this recent

[18] In *Bell* v. *Burson*, *supra*, the Court invalidated on due process grounds a Georgia statute that required suspension of an uninsured driver's license and automobile registration if the driver was involved in an accident and failed to post security for the amount of damages claimed; the statute did not provide for any determination of fault. In *Stanley* v. *Illinois*, *supra*, the Court struck down, ultimately on the basis of the Equal Protection Clause, an Illinois statutory scheme that declared the children of an unmarried father wards of the state upon the death of the mother, with no determination of the father's fitness to be a parent. Although the Court

line of "irrebuttable presumption" cases. While there has been some question about the appropriate role of the irrebuttable presumption doctrine in Supreme Court adjudication,[19] appellants submit that the doctrine has no application to the Court's consideration of the constitutional questions raised in this case. Cf. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 376-377 (1973).

A comparison of the recent "irrebuttable presumption" cases with this case demonstrates that the factors prompting application of the doctrine are absent here. Whenever the doctrine has been applied, the Court has begun its analysis with a first-level inquiry into the rationality of the statutory or regulatory classification scheme under attack, examining it in light of the governmental purposes which the state has asserted it serves. In each case the Court has found the state's justifications for the scheme dubious at best and on some occasions wholly unsupportable. At this point, when the statute's veneer of rationality has been all

did not base either decision on the "irrebuttable presumption" doctrine, the cases may be viewed as precursors to the *Vlandis*, *Murry* and *LaFleur* cases. It is important to note however, that the statutes under challenge in *Bell* and *Stanley* already provided for individual administrative hearings. The critical issue in *Bell* was whether the hearing called for should consider the factor of liability, 402 U.S. at 536, 541. In *Stanley*, the issue was whether the hearing on parental fitness accorded other classes of parents in child neglect proceedings should also be accorded unwed fathers, 405 U.S. at 646-647, 658.

[19] *See, e.g., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 652 (Powell, J., concurring), 657, 660 (Rehnquist, J., joined by Burger, C.J., dissenting); *United States Dept. of Agric.* v. *Murry*, 413 U.S. 508, 524, 525 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting); *Vlandis* v. *Kline*, 412 U.S. 441, 460-62 (Burger, C.J., joined by Rehnquist, J., dissenting), 466, 467-69 (Rehnquist, J., joined by Burger, C.J., and Douglas, J., dissenting); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1974).

but stripped away under the Court's scrutiny, the Court has turned to the irrebuttable presumption doctrine. The Court has underscored the vulnerability of the statute by pointing out that the state's asserted objectives could be served as well by individual determinations, with less substantial impairments of personal interests.

Thus in *Vlandis* v. *Kline*, 412 U.S. 441 (1973), the Court considered a Connecticut statute which provided that students would be classified as nonresidents for university tuition purposes if they had a legal address outside the state at the time of application for admission. The state advanced three justifications in defense of its classification plan: it furthered the valid state interest of equalizing higher education costs between residents and nonresidents; it served to distinguish between old and new residents and to reward the former for tax contributions by offering a lower tuition fee; and it provided the administrative certainty necessary for the state to prevent non-residents from fraudulently obtaining the lower resident rates of tuition. With respect to the first, the Court found that "basing the bona fides of residency solely on where a student lived when he applied for admission to the University is using a criterion wholly unrelated to that objective," 412 U.S. at 448-449. With respect to the second, favoring established residents over new ones, the Court stated that the statute made no such distinction on its face, and that "the State cannot now" assert this type of after-the-fact rationale. *Id.* at 449. Moreover, the statute "would not always operate to effectuate the State's asserted interest." *Id.* Finally, the Court rejected the interest in administrative certainty because, standing alone, it was an insufficient justification for the statute's arbitrary definition and classification of non-residents. With the rationality of the legislative scheme thus under siege, the Court then turned to the Due Process

Clause, stating that in this situation "reasonable alternative means for determining bona fide residence are available" which would permit individualized determinations of residence to replace the statutory presumption of nonresidence. *Id.* at 451. Indeed, the Court points out that the state itself through its Attorney General had already set forth reasonable criteria for making these determinations. *Id.* at 451, 454.

United States Department of Agriculture v. *Murry*, 413 U.S. 508 (1973), presents a similar two-step analysis. The statute under challenge was a 1971 amendment to the Food Stamp Act of 1964, denying eligibility to any household that included a person aged eighteen or older who had been claimed as a tax dependent for the previous year by a member of another household that was itself ineligible. The amendment purported to serve the legislative purpose of preventing abuses of the Food Stamp program by non-needy households. 413 U.S. at 512-513. However, when the amendment was examined in relation to this objective, the Court found it to be doubly irrational: first, tax dependency in a prior year was entirely irrelevant to the nutritional need of the dependent in the following year; second, regardless of this problematical time lag, tax dependency of one individual clearly had no relation to the nutritional need of the rest of the household in which he lived. *Id.* at 513-514. Having thus undermined any claim of rationality for the statutory classification, the Court then delivered a final blow to the scheme by observing briefly that it rested "on an irrebuttable presumption often contrary to fact" and therefore lacked certain "critical ingredients of due process. . . ." *Id.* at 514. *See also United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 538 (1973).[20]

[20] It should also be noted that the *Murry* case involved a federal and not a state statute. Accordingly, the constitutional challenge to its validity

These decisions should not govern the Court's consideration of Mass. Gen. Law ch. 32, § 26(3). As demonstrated in Part I *supra*, the Massachusetts determination to retire uniformed State Police at age 50 has always been designed to serve the dual purposes of maintaining a physically sound police force consistent with providing financial benefits in recognition of the individual's extended service and continuing economic needs. The federal government and many states have enacted similar mandatory retirement laws for their police forces to further the identical governmental purposes. Appellants suggest that the traditional and widespread existence of such laws attest to their continued ability to serve their intended purposes. Indeed, this Court has already accepted the validity of mandatory retirement schemes. *McIlvaine* v. *Pennsylvania*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974) (mandatory retirement of State Police at age 60); *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd*, 95 S. Ct. 1319 (1975) (mandatory retirement of federal civil servants at age 70). Thus, in contrast to the statutes involved in *Vlandis* v. *Kline*, *supra*, and *United States Department of Agriculture* v. *Murry*, *supra*, no summary rejection of the rationality of Massachusetts' State Police retirement law can be made. As a result, there is no basis for calling the doctrine of irrebuttable presumptions into play.[21]

Nor is this case controlled by *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), despite the suggestion of the district court to the contrary. 376 F. Supp. at 756. In *LaFleur* the Court struck down school board rules which mandated maternity leaves for pregnant teachers beginning their fifth or sixth months of pregnancy. 414 U.S. at 647-648. The school boards advanced two justifications for these rules: continuity of instruction and the necessity of keeping physically unfit teachers out of the classroom. *Id.* at 640-641. The Court rejected the arbitrary cut-off dates embodied in the rules as bearing no rational relation to this first objective, finding that they actually would frustrate the goal of continuity in many instances. *Id.* at 643. Turning to the second objective, the Court recognized that the rules did serve "to insulate the classroom from the presence of potentially incapacitated pregnant teachers" but found that they swept too broadly by establishing in effect "a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing." *Id.* at 644. The Court held that this conclusive presumption was "neither 'necessarily [nor] universally true,'" and in violation of the Due Process Clause. *Id.* at 646.

Although there is a superficial similarity between *LaFleur* and this case—appellants here similarly contend that the mandatory retirement statute under challenge furthers the valid state purpose of maintaining a physically fit State Police force—critical factors differentiate the two cases. Intimately intertwined with the pregancy regulaions were fundamental interests in privacy and the family which the Court increasingly has found deserving of special protection. Indeed, the majority opinion of the Court in *LaFleur* begins with a reference to these interests:

> This Court has long recognized that freedom of per-

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was necessarily made under the Due Process Clause of the Fifth Amendment rather than the Equal Protection or Due Process Clause of the Fourteenth Amendment. The same is true of *United States Dept. of Agric.* v. *Moreno*, *supra*, although the amendment to the Food Stamp Act at issue there was in fact considered within the framework of equal protection analysis. 413 U.S. at 538.

[21] The question of the statute's rationality is addressed at length in Part IV *infra*.

> sonal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . . As we noted in *Eisenstadt* v. *Baird*, 405 U.S. 438, 453, there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
>
> . . . Because public school maternity leave rules directly affect "one of the basic civil rights of man," *Skinner* v. *Oklahoma* . . . the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. 414 U.S. at 639-640 [citations omitted].

Accord, Stanley v. *Illinois*, 405 U.S. 645, 651 (1972). No such fundamental interest compels the use of the irrebuttable presumption doctrine in this case. Indeed, appellants submit that the appellee's asserted interest in continued public employment in fact does not fall within the scope of the Due Process Clause of the Fourteenth Amendment. When Murgia joined the uniformed State Police in 1948, the governing Massachusetts statute, Mass. Gen. Laws ch. 32, § 26(3) explicitly mandated retirement at age 50. His expectancy in job continuity was therefore no different than that asserted by the plaintiff in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972)—an expectancy which this Court held did not constitute a "property interest" under the Fourteenth Amendment. *Id.* at 578.[22] *See also Arnett* v. *Kennedy*, 416 U.S. 134, 152-154, 155 (1974) (plurality opinion).

[22] The district court cited the *Roth* case in a footnote, stating that: "To the extent that it may affect plainiff's due process rights, see *Board of Regents* v. *Roth* . . . , we note that after six years of service no officer who passes the physical can be denied reenlistment. Mass. G.L. c. 22, § 9A." 376 F. Supp. at 754, n. 4 [citations omitted]. However, the court nowhere confronts the fact that at the time Murgia entered the State Police force, the law explicitly imposed a definite limit on length of service.

Apart from the compelling privacy undertones in *LaFleur*, that case is further distinguishable on its record. In striking down the rules mandating maternity leaves at five and six months of pregnancy the Court stressed that every expert medical witness in the proceedings below had agreed that "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." 414 U.S. at 645-646. This agreement indicated that until the very last weeks of pregnancy, *no* general relationship could be shown between that condition and physical capacity to teach. *Cf. id.* at 647, n.13. At the same time, the weight of the evidence apparently established that a significant number of teachers were in fact capable of working beyond the cut-off dates established by the school boards. See *id.* at 646, *id.* at 645-655 (Powell, J., concurring.) The case now before the Court presents precisely the reverse situation. As stated by the district court, "[e]ven plaintiff's experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." 376 F. Supp. at 755. However, there was no agreement—and indeed no specific evidence—that a great many State Police officers would be able to perform their jobs adequately after the age of 50. The only specific evidence introduced was the physical condition of the single plaintiff. The one doctor who had experience with the medical condition of a broad range of State Police officers testified in detail as to why in his opinion the average officer was unfit at the age of 50. See Statement of the Case, pp. 9-10 *supra*.

Thus in contrast to the record in *LaFleur*, the record in

this case offers no showing that the legislative judgment of diminishing ability embodied in § 26(3) is contrary to fact. Accordingly, appellants urge that this case, again in contrast to *LaFleur*, is not one in which individualized determinations are a proper alternative to the statutory classification scheme.[23]

In equating the case at bar with *Cleveland Board of Education* v. *LaFleur, supra,* the district court failed to recognize these significant differences between the two cases. The court did suggest that individualized determinations would not be constitutionally required if the legislative line had been "drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other." 376 F. Supp. at 755. However, it offered no criteria for locating the point where the range of fairness ends and a zone of unfairness begins. Nor did the court indicate how it would determine what constitutes "some appreciable state interest." Rather the court concluded that since individualized medical screening was available and indeed already required in some instances, and since appellants had failed to show that such medical testing would be useless at age 50, *id.* at 755-56, the retirement line drawn by the Massachusetts Legislature was unconstitutional.

Appellants respectfully suggest that the district court's holding in this case is not only erroneous but contains dis-

[23] Furthermore, although the Court in *LaFleur* did not rely on such intimations, it did note that the records in *LaFleur* and its companion case suggested "the maternity leave regulations may have originally been inspired by other, less weighty, considerations" such as keeping visibly pregnant teachers out of the students' sight. 414 U.S. at 641, n. 9. *See also Id.* at 653 (Powell, J., concurring). The record in this case offers not the slightest implication that the Massachusetts Legislature was intending to further inappropriate or improper purposes through its mandatory retirement law. To the contrary, see Parts I-II *supra.*

turbing implications for the continued viability of the legislative process. The logical extension of the holding would subject every exercise of legislative line-drawing to judicial revision if in fact individualized determinations could be made, particularly where the results of those determinations would show that the line drawn did not result in the perfect classification of every affected individual. This is precisely the result feared by Justice Rehnquist in his dissenting opinion in *LaFleur* where he stated that the extention of the Court's opinion might well lead to the invalidation of mandatory retirement laws. He prophesied that:

> In that event federal, state, and local governmental bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical impairment and senility. 414 U.S. at 659.[24]

Appellants urge that the Court recognize the substantial differences between the recent "irrebuttable presumption" cases and the present case and find that the doctrine has no place here.

[24] In citing the fears expressed by Justice Rehnquist in *LaFleur* appellants do not question the Court's holding in that case. Rather they suggest that potential misunderstanding about the parameters of the irrebuttable doctrine would extend the doctrine to reach beyond the narrow confines of *LaFleur* itself, with the unfortunate results prophesied by Justice Rehnquist.

IV. THE MASSACHUSETTS MANDATORY RETIREMENT AGE FOR UNIFORMED STATE POLICE IS RATIONALLY RELATED TO A LEGITIMATE, ARTICULATED STATE OBJECTIVE.

The ultimate question in this case is whether Mass. Gen. Laws ch. 32, § 26(3), mandating the retirement of uniformed State Police officers at the age of 50, violates the Equal Protection Clause. Its resolution requires the Court to consider the underlying question whether the statute "rationally furthers some legitimate, articulated state purpose . . . ." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973); *McGinnis* v. *Royster*, 410 U.S. 263, 270 (1972). *See also F.S. Royster Guano Co.* v. *Virginia*, 253 U.S., 412, 415 (1920).[25] Applying this test,

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[25] The cited "rational relationship test" is clearly the appropriate standard of review in this case, rather than the alternative standard of strict judicial scrutiny. Neither of the traditional prerequisites for applying the more rigorous standard is present here. Age has never been treated as a "suspect classification" by the Court and should not be, for it contains

> none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio Ind. School Dist.* v. *Rodriguez, supra* at 28.

Similarly, the right to public employment has never been considered a fundamental interest "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34. Indeed, in the context of federal public employment, the Court has held that absent an entitlement created by applicable legislation, such employment can be summarily denied or terminated. *Arnett* v. *Kennedy*, 416 U.S. 134, 152 (1974). *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961). As the Court stated in the *San Antonio* case, *supra*, "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." 411 U.S. at 33. *See Weisbrod* v. *Lynn*, 383 F.Supp. 933, 936-937 (D.D.C. 1974), *aff'd*, 95 S. Ct. 1319 (1975). Moreover, in its opinion the district court itself purported to use the "rational relationship" standard. 376 F. Supp. at 754.

the dual objectives referred to in Part I, *supra*, are plainly legitimate. And while one may debate the wisdom of 50 as the retirement age for uniformed State Police officers, the history and context of this legislative determination establish its rationality. The statute therefore is constitutional.

Neither the Massachusetts Contributory Retirement Law in general nor the particular section concerned with uniformed State Police officers constitutes an aberrational or unique legislative scheme. In addition to Massachusetts every state as well as the federal government has established a mandatory retirement and pension system for its public employees to further the combined purposes of promoting effective government service and providing for the financial security of the retired worker. (See pp. 14-19, *supra*.) Most states and the federal government have also prescribed a lower mandatory retirement age for their police officers than for other occupations in order to maintain a vigorous, active and healthy force. (See pp. 23-25, *supra*.) The reasonableness of such provisions has been upheld in several cases. *See, e.g., McIlvaine* v. *Pennsylvania*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974); *Air Line Pilots Ass'n, Int'l* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 336 U.S. 962 (1962); *McCarthy* v. *Sheriff of Suffolk County*, Mass. Adv. Sh. (1975) 325, 322 N.E.2d 758 (1975). Cf. *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 805 (1975). In light of this unanimous national experience—both legislative and judicial—the rationality of the Massachusetts retirement and pension scheme cannot be denied. The only significant question remaining is whether the particular designation of 50 as the mandatory retirement age for its uniformed State Police is in and of itself a rational line for the Massachusetts Legislature to draw.

Classification by age is a traditional and well-established legislative power, employed in a variety of contexts and approved by the courts. *See, e.g., Oregon* v. *Mitchell,* 400 U.S. 112, 206-207 (opinion of Harlan, J.), 243-244 (opinion of Brennan, White and Marshall, JJ.), 294-295 (opinion of Stewart, J.) (1970); *Cf. Stanton* v. *Stanton,* 95 S. Ct. 1373 (1975). The district court itself recognized the existence and indeed necessity of this legislative prerogative. 376 F. Supp. at 755. Given the acknowledged authority of a legislatiure to draw lines on the basis of age and the presumption of validity to which its legislation is entitled, *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911), the record of this case supports a finding that retirement of uniformed State Police officers at 50 is a rational choice well within the bounds of legislative discretion.

As the district court acknowledged in its opinion, "there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." 376 F. Supp. at 755. It also recognized "that the duties [of the uniformed State Police officers] are sufficiently more arduous than, or the physical and mental stresses significantly different from, those of detectives or policemen in the other branches and at other levels of government, so that there is no viable unequal protection claim in this area." 376 F. Supp. at 754, n.3. Appellants submit that the existence of these two elements alone satisfied whatever burden they bore to demonstrate the rationality of the legislative determination, and required the district court to uphold the constitutionality of the challenged statute. *Cf. Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).[26]

[26] Apart from its determination that the availability of individualized determinations of an officer's capacity to continue on the job rendered the statute irrational – a conclusion discussed in detail at pp. 34-42 *supra* –

Moreover, the evidence offered by the appellee in no way undermines the statute's validity. The only specific evidence appellee introduced related to his own generally healthy condition. While he may not be unfit or even have a relatively low functional age, such a fact hardly serves to invalidate the legislative determination. "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial function." *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 8 (1974) (footnote omitted). *See Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970); *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 51

the district court appears to have based its finding of irrationality on its interpretation of certain statistical evidence introduced. Thus it pointed to two sets of statistics concerning non-injury disability retirements and non-injury disability retirement waivers for officers between the ages of 40 and 50 and stated that "[t]he statistics furnish no reason to suppose that age 50 is within, or even significantly approaching, a range where changes of conditions warrant a change of treatment. Rather they contradict it." 376 F. Supp. at 756, and n. 7. The difficulty with the court's conclusion is that the statistics present only half the picture. They furnish no evidence that after the age of 50 the non-injury disability retirement rates do not increase significantly, thus making 50 in fact the critical turning point the court seemed to require. *See* 376 F. Supp. at 755. It is true that such statistics probably do not exist, as the mandatory retirement age of 50 has been in effect since 1939. The point is, however, that under the governing "rational relationship" standard of review, appellants did not have the burden of establishing 50 as a turning point in order that the statute's constitutionality be sustained. Having demonstrated that age is related to performance as a State Police officer and that the demands of the job are more strenuous than other types of police work, its burden was satisfied. *See, e.g., Jefferson* v. *Hackney,* 406 U.S. 535, 546-47 (1972).

The second type of statistical evidence relied on by the District Court was a list of statutes showing Massachusetts to be the only state mandating retirement of its state police at 50.

This evidence is not controlling. As mentioned above, see pp. 25-26 *supra,* the very lack of uniformity of retirement ages mandated by the different states demonstrated that there is no single accepted age of retirement against which the Massachusetts statute can be judged.

(1973). Furthermore, as shown by the varying opinions of the physicians who testified, there is no widespread agreement on the appropriate retirement age for State Police officers. The determination of such an age involves difficult judgments about the relationship between aging and physical and psychological capability. It will inevitably be based on conflicting and speculative medical opinion. Recently the Court has observed:

> When Congress undertakes to act in areas frought with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices. *Marshall* v. *United States*, 414 U.S. 417, 427 (1974) (consitutionality of Title II of Narcotic Addict Rehabilitation Act of 1966).

The physicians' testimony introduced by appellee clearly demonstrates that the medical judgments relating to retirement are fully as uncertain as those referred to in the *Marshall* opinion.

Quite apart from attempting to resolve a problem with medical dimensions, it is significant that the Massachusetts Legislature here has developed far more than a regulatory scheme. The challenged statute represents an effort to mesh retirement provisions with pension benefits—regulating certain terms of public employment it is true, but at the same time extending to those employees some guarantee of financial security once they retire from their jobs.[27] Like the Texas school financing system challenged in *San*

[27] Moreover, as the legislative history of the Massachusetts retirement laws demonstrates, in many cases the impetus for legislation mandating or permitting earlier retirement came from the public employees themselves. *See* pp. 16, 27 n. 14 *supra*.

Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973), "... in substance, the thrust of the ... [Massachusetts retirement and pension] system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the States under the Constitution." 411 U.S. at 39 (footnotes omitted). *See also Marshall* v. *United States, supra* at 428 (1974).

It may be argued that Massachusetts' determination to retire its uniformed State Police officers at 50 does not represent the wisest retirement line that could be drawn. Appellants respectfully suggest that here, as in so many complex areas of judgment, the disposition to criticize the Legislature's choice diminishes as one moves from the level of the abstract and begins to appreciate the diverse and conflicting factors demanding accommodation. Moreover, decisions of this Court have declared plainly that judgments as to the wisdom or soundness of such determinations are not for the courts to make. Thus in the recent case of *Kahn* v. *Shevin*, 416 U.S. 351, 356 n.10 (1974), the Court noted:

> The dissents argue that the Florida Legislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. But the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limitations. The dissents would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies

> [which] are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U.S. 726, 730.

Accord, Dandridge v. *Williams*, 397 U.S. 471, 487 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). The deference to the legislative process emphasized in *Kahn* is clearly warranted here. The history of retirement legislation in Massachusetts demonstrates the state's sensitivity to suggestions for change and its commitment to continuous reexamination of its retirement law policy. See Part II, pp. 29-32, *supra*.

In summary, Mass. Gen. Laws ch. 32, § 26(3) must be viewed through a doctrinal prism sensitive to legislative history and the complex medical, social, and economic factors that inhere in legislative judgments. Such an examination reaffirms the "original constitutional proposition" that such judgments are peculiarly within the legislative competence. In this regard, the Court's description of the Texas school financing system at issue in the *San Antonio* case, *supra*, graphically expresses the essence of the Massachusetts retirement system:

> The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled . . ., it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions.

> . . . One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. . . . We hold that the Texas plan abundantly satisfies this standard. 411 U.S. at 55 [citations omitted].

Accordingly, this Court should hold that the Massachusetts retirement statute for its uniformed State Police officers rationally furthers a legitimate, articulated state purpose.

CONCLUSION

For the reasons stated above, the order of the district court should be reversed.

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Respectfully submitted,

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